SUPREME COURT, U. S.

JAN 27 1969

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 985

CYRUS S. EATON,

Petitioner,

—v.—

HAROLD S. HOBSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Rule Involved	2
Question Presented	3
Statement of the Case	3
Previous Litigation	5
Proceedings in District Court	5
Opinion of the Court of Appeals	7
Proceedings Upon Remand	7
Reasons Why the Writ Should Be Granted	8
Conclusion	12
Appendix A	1a
Appendix B	9a
Appendix C	25a
Appendix D	27a

TABLE OF AUTHORITIES

PAGE

Cases:

Cleveland Trust Co. v. *Eaton*, 11 Ohio Misc. 151, 229 N.E.2d 850 (1967) 5

Cross v. *Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954) 10

Dalehite v. *United States*, 346 U.S. 15 (1953) 9

(2d Cir. 1965) 12

Featherstone v. *Barash*, 345 F.2d 246 (10th Cir. 1965) 12

Kelly v. *Everglades Drainage District*, 319 U.S. 415 (1943) 8

Leighton v. *One William Street Fund*, 343 F.2d 565

Schneidermann v. *United States*, 320 U.S. 118 (1943) 9

United States v. *El Paso Gas Co.*, 376 U.S. 651 (1964) 12

United States v. *Forness*, 125 F.2d 928 (2d Cir. 1942), *cert. denied*, 316 U.S. 694 ..... 11, 12

Statutes and Rules:

28 U.S.C. §1254(1) 2

28 U.S.C. §1332(1) 2

Federal Rules of Civil Procedure, Rule 52(a) 2, 3, 8, 12

Rules of the Supreme Court of the United States, Rule 19 12

Miscellaneous:

30 American Jurisprudence 2d 344 8

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Cyrus S. Eaton, petitioner herein, by his attorneys, prays that a writ of certiorari issue to the Court of Appeals for the Sixth Circuit to review the decision of that Court in this case.

Opinions Below

The District Court entered "Findings of Fact and Conclusions of Law" which are not reported but are printed in Appendix B, hereto, and filed a "Conclusion on Remand," which is not reported but printed in Exhibit D, hereto. The opinion of the Court of Appeals is reported at 399 F.2d 781 and is printed in Appendix A, hereto and a supplemental opinion is reported at 399 F.2d 781 and printed in Exhibit C, hereto.

Jurisdiction

Jurisdiction in the District Court was based on 28 U.S.C. § 1332(1).

Judgment was entered by the District Court on June 7, 1966, and a timely appeal followed. The Court of Appeals on September 20, 1968 entered a judgment affirming the order of the District Court, and a petition for rehearing filed by Petitioner was denied on October 29, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Rule Involved

Rule 52(a) of the Federal Rules of Civil Procedure provides in pertinent part:

> "(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; . . . . Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . . If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein . . . ."

Question Presented

When a fiduciary claims that a gift of trust property has been made to him by the beneficiary thereof, and the Court of Appeals has remanded the case for reconsideration of the evidence because such a gift must be proven by clear and convincing evidence rather than by the lower standard of proof erroneously applied by the District Court, is the accepted course of judicial procedure and Rule 52(a) of the Federal Rules of Civil Procedure violated when the Court of Appeals affirms the conclusion of the District Court, upon remand, that the alleged gift has been proven by clear and convincing evidence even though (a) the District Court has made no findings of the facts relied upon by it in reaching this conclusion, and (b) the Court of Appeals did so without making any such findings itself, so that in the end there is a complete absence of any indication of the evidence upon which the courts below based their decisions?

Statement of the Case

Many years ago—between 1930 and 1935—Cyrus Eaton, the well known industrialist, and then a director of the Cleveland Trust Company, loaned certain sums to a vice-president of the bank, Frank Hobson, who was experiencing some financial difficulties. These loans totaled $27,500 and were advanced in part by Mr. Eaton personally and in part by a corporation of which he was the sole stockholder. (399 F.2d at 782, p. 2a, *infra*)

In 1936 Frank Hobson died. Following his death Mr. Eaton assigned the claims against the Frank Hobson Estate

arising out of these loans to a minor employee, Harold S. Hobson, a man no way related to the deceased Frank Hobson, for the sole purpose of collecting these amounts from the Cleveland Trust Company, the executor of Frank Hobson's estate. With respect to the $10,000 advances made by Mr. Eaton personally, Mr. Hobson signed an acknowledgment that the assignment was for "purpose of collection" (399 F.2d at 782-783, pp. 2a-3a, *infra*), and as to all the advances the "trial judge specifically found that the plaintiff [Harold Hobson] was originally designated as agent for collection only." 399 F.2d at 784, p. 6a, *infra*.

Thereupon, Harold Hobson filed the claims with the Cleveland Trust Company as executor of the Frank Hobson estate and the claims were allowed in September, 1936. In February 1938, the executor made a partial distribution to the Estate, issuing a check in the amount of $6,178.58 to Mr. Harold Hobson. Consistent with his obligations as an assignee of these claims for collection only, Harold Hobson disbursed this amount by paying it to Mr. Eaton or on Mr. Eaton's account. 399 F.2d at 783, p. 4a, *infra*.

Further activity in the Frank Hobston Estate was delayed until 1960 when Frank Hobson's widow, who was entitled to income from the remainder of the Estate for her life, died. (399 F.2d at 783, p. 4a, *infra*) By this time Harold Hobson was no longer an employee of Mr. Eaton and had long since gone into another business. (Tr. 2)[1]

In November 1961, on requisition of Frank H. Hobson, Jr., the beneficiary of the Frank Hobson Estate, the claim

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[1] References to the transcript of the record in the District Court are cited herein as "Tr. ——."

asserted against the estate by Harold Hobson was rejected because of the known interest of Mr. Eaton therein. (399 F.2d at 783, p. 4a, *infra*)

Previous Litigation

Thereupon, Harold Hobson brought an action in the United States District Court for the Northern District of Ohio against the Cleveland Trust Company as executor, as well as against the beneficiaries of the Estate. In October 1962 a settlement of that case was concluded pursuant to which Mr. Harold Hobson was to receive approximately $45,000, payable in a series of installments. Mr. Eaton was not a party to this action or otherwise advised of its pendency,[2] and when he learned of it, he brought an action in the Court of Common Pleas in Cuyahoga County to enjoin Cleveland Trust Company and Frank Hobson, Jr. from making any further payments to Harold Hobson pursuant to this settlement agreement. 399 F.2d at 783, p. 4a, *infra.*

Proceedings in District Court

Harold Hobson then brought the present action for a declaratory judgment that he, and not Mr. Eaton, was the beneficial owner of the claims against the Frank Hobson Estate. 399 F.2d at 783, p. 4a, *infra.*[3]

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[2] There is other litigation pending between Mr. Eaton and the Cleveland Trust Company which may have significant impact on the control and management of the Cleveland Trust Company, see *Cleveland Trust Co.* v. *Eaton,* 11 Ohio Misc. 151, 229 N.E.2d 850 (1967).

[3] Mr. Eaton filed a counterclaim in which he sought to have the settlement agreement declared null and void.

At the trial of the case Mr. Hobson based his entire case on his testimony that:

(a) on either the day of the assignment of the claims to him for purposes of collection only or on the day thereafter, Mr. Eaton called him into his office and said, "You take these two claims as a salary bonus." This conversation is conveniently said to have taken place outside the hearing of any witnesses (Tr. 22, 123-126, 399 F.2d at 781, pp. 3a, 17a, 18a, *infra*).

(b) he paid the proceeds of the distribution of part of the Frank Hobson Estate in 1938 to Mr. Eaton because, again conveniently, out of the hearing of any witnesses, Mr. Eaton asked him to "turn over the dividend that was coming from the Frank Hobson estate" but stated "the balance of it, of course, is yours. You may get something out of it some day." (Tr. 39-42, pp. 18a-19a, *infra*)

These two conversations were, of course, denied by Mr. Eaton at trial. (p. 19a, *infra*)

The District Court in its Findings of Fact and Conclusions of Law, held that:

> "It is my conclusion and judgment that plaintiff, Hobson, has proved by a preponderance of the evidence that he is the true and beneficial owner of the claims . . . [against the Frank Hobson Estate]." (p. 24a, *infra*)

Opinion of the Court of Appeals

The Court of Appeals remanded the case to the District Court on the ground that the District Court had applied the wrong standard of proof, *i.e.*, the preponderance of evidence rule. (399 F.2d at 785, p. 8a, *infra*) It held that under Ohio law there was "a presumption that the beneficiary of a trust does not make a gift of trust assets to his fiduciary, that is, his agent or trustee" and that evidence to overcome this presumption must be "clear and convincing." (399 F.2d at 784, pp. 6a-7a, *infra*) The Court of Appeals remanded the case to the District Court "with instructions to the trial judge to reconsider the evidence in the light of the applicable rule of clear and convincing evidence and report his conclusion to this Court," and retained jurisdiction over the appeal. (399 F.2d at 785, p. 8a, *infra*)

Proceedings Upon Remand

On remand, the District Court, without making any further findings, simply submitted to the Court of Appeals a document entitled "Conclusion on Remand" which stated the court's finding and conclusion that "the plaintiff Harold S. Hobson has proved by clear and convincing evidence that he was the recipient of a gift from the defendant, Cyrus S. Eaton, of the beneficial interests in the claims involved herein." (p. 28a, *infra*)

Thereupon, the Court of Appeals issued a supplemental opinion in which, without any further statement as to the evidence relied upon by it, it affirmed the judgment of the District Court. (399 F.2d 785, p. 26a, *infra*)

Reasons Why the Writ Should Be Granted

This case raises important questions relating to the administration of justice and the proper application of Federal rules, especially Rule 52(a) of the Federal Rules of Civil Procedure.

The Court of Appeals held that, under Ohio law, there is a presumption against a gift of trust property to the fiduciary, that such gift must be proved by clear and convincing evidence; and remanded the case for reconsideration of the evidence in the light of that rule.

However, the significant protection which the "clear and convincing evidence" rule should provide against fraud by fiduciaries was severely diluted by the failure of the courts below, after remand, to make any findings indicative of the evidence regarded by them to constitute clear and convincing proof of the alleged gift. The procedures followed by the courts below would, if generally followed, erode and render meaningless the many judicial decisions requiring in certain situations clear and convincing evidence to prevent fraud.[4]

This Court had consistently held that under Rule 52(a) of the Federal Rules of Civil Procedure that "there must be findings, in such detail and exactness as the nature of the case permits of subsidiary facts on which the ultimate conclusion . . . can rationally be predicated." *Kelly* v. *Everglades Drainage District,* 319 U.S. 415, 420 (1943).

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[4] Examples of other situations where the courts have required clear and convincing evidence are to establish a parol trust in real or personal property, where reformation or cancellation of a written instrument is sought, or to impeach an acknowledgment. 30 American Jurisprudence 2d 344.

See *Dalehite* v. *United States,* 346 U.S. 15, 24 n.8 (1953); *Schneidermann* v. *United States,* 320 U.S. 118, 129-131 (1943)

However, in response to the Court of Appeals' remand of the case "to reconsider the evidence in the light of clear and convincing evidence rule," the District Court prepared a "Conclusion Upon Remand" which did nothing more than state in the most conclusionary terms that "upon a careful and thorough reconsideration of the evidence . . . the Court finds and concludes that the Plaintiff Harold S. Hobson has proved by clear and convincing evidence that he was the recipient of a gift, from the Defendant Cyrus S. Eaton . . . ." (p. 28a, *infra*)

Upon receipt of the Conclusion on Remand the Court of Appeals issued a supplemental opinion, simply stating, without any further discussion of the evidence that:

> "We have considered the report of the trial judge together with the briefs of the parties with regard thereto and conclude that the supplemental finding of the trial judge is supported by the evidence and is not clearly erroneous." 399 F.2d at 785, p. 26a, *infra*

As noted above, while the Court of Appeals may well have expected a "report" from the trial judge, the trial judge's characterization of what he did as a "Conclusion on Remand" is far more accurate. Nor, of course, could "the briefs of the parties" deal in a meaningful manner with the District Judge's report with any indication of what evidence it had relied upon as being clear and convincing.

Neither do the "Findings of Fact and Conclusions of Law" or the original opinion of the Court of Appeals refer to any evidence which could reasonably be assumed to have

been relied upon, *sub silentio,* by the lower courts as clear and convincing proof of the alleged gift.[5]

(1) The only affirmative evidence referred to in the Findings of Fact and Conclusions of Law to establish the alleged gift is the self-serving testimony of Harold Hobson.[6]

(2) The opinion of the Court of Appeals contains a fairly detailed statement of facts, but the only evidence of the alleged gift to which it refers is the uncorroborated testimony of Harold Hobson.[7]

Accordingly, the net result of these judicial proceedings below is as follows:

Neither the Court of Appeals nor the litigants know what evidence was considered by the District Court, upon remand, to constitute clear and convincing proof of the alleged gift to Mr. Harold Hobson. The litigants have no idea whether the Court of Appeals' affirmance of the District

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[5] Clear and convincing evidence is defined as " 'that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established.' " *Cross* v. *Ledford,* 161 Ohio St. 469, 120 N.E.2d 118, 123 (1954).

[6] The District Court's holding that Mr. Hobson had proven his case by a "preponderance of the evidence" is based solely on events nearly thirty years ago by which Mr. Eaton allegedly concealed from his creditors his ownership of claims against the Frank Hobson Estate. The allegation of such concealment was made by counsel for Mr. Harold Hobson below to support a contention this precluded Mr. Eaton as a matter of law from now asserting his ownership in the claims. It seems quite obvious, however, that even if Mr. Eaton did conceal his assets this would be added proof that Mr. Eaton was the owner thereof and he has not given them to Mr. Hobson. (pp. 20a-23a *infra*)

[7] The Court of Appeals does not even mention in its opinion the alleged concealment of assets from creditors which had formed the basis for the District Court's finding.

Court's Conclusion on Remand was based on the same unstated evidence upon which the District Court relied, or upon some totally different evidence which the Court of Appeals found to be sufficient to meet the clear and convincing test. Not one of the four opinions rendered in this case contains any finding of the "clear and convincing" evidence supposedly proving the purported gift.

This raises, we think serious questions in the administration of justice.

(a) In the total absence of any indication by the courts below of the factual basis of their decision, the beneficiary, whose fiduciary claims a gift of the trust assets, is likely to be left with a deep, abiding feeling that he has been defrauded, and that the courts below have not given proper consideration to his case and have failed to protect his rights. We submit that to assure the proper respect for the courts, their processes and the rule of law, there must be at least a minimal disclosure of the factual basis of the courts' rulings in such cases.

(b) The higher standards of proof required by the courts to avoid fraud in some situations will become uncertain and arbitrary in their application if they are applied not on the basis of facts but merely on the personal feelings and whims of individual judges.

(c) In the absence of findings there can be no assurance that the courts below have reviewed the record, in light of the clear and convincing evidence rule, with the care required to prevent possible fraud by a fiduciary.

As Judge Frank stated in *United States* v. *Forness,* 125 F.2d 928, 942 (2nd Cir. 1942), cert. den. 316 U.S. 694,

> "For as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid

carelessness in the discharge of that duty; often a strong impression that on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper." Cf. *United States* v. *El Paso Gas Co.*, 376 U.S. 651, 656 (1964).

No judge had expressed on paper the facts which are said to constitute clear and convincing evidence of the alleged gift.[8]

CONCLUSION

For the reasons stated above, we submit that this case represents such a departure "from the expected and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision," (Rule 19, Rules of the Supreme Court of the United States), and that therefor the writ should be granted.

Respectfully submitted,

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[8] One of the most important purposes of findings of fact, pursuant to Rule 52(a), is to "evoke care on the part of the trial judge in ascertaining the facts." *Leighton* v. *One William Street Fund, Inc.*, 343 F.2d 565, 567 (2d Cir. 1965); *Featherstone* v. *Barash*, 345 F.2d 246, 249 (10th Cir. 1965); *United States* v. *Forness*, 125 F.2d 928, *supra* at 942.